Healthy Minds, Inc. *and* Kimberly R. Defrese-Reese.
Case 15–CA–231767

July 15, 2021

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS EMANUEL AND RING

On December 21, 2020, Administrative Law Judge Michael A. Rosas issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.[3]

For the reasons discussed below, we find, contrary to the judge, that the Respondent violated Section 8(a)(1) of the Act on July 25, 2018,[4] by coercively interrogating Kimberly Defrese-Reese (Reese) and Misty Hollis (née Stacey) and by discharging Reese.

I. FACTUAL BACKGROUND

At all times relevant to this case, the Respondent provided mental health counseling services from its facility in Bastrop, Louisiana.[5] Dr. Angela Nichols, Garland Smith, and Jerry Brown owned and operated the Respondent, which employed 20 to 50 employees. They also owned and operated House of Hope, a therapeutic group home for boys with behavioral problems that was adjacent to the Respondent's facility.[6] Dr. Nichols served as the Executive Director and Program Director at both the Respondent and House of Hope.

In March 2015, Reese began working for the Respondent as an assistant office manager, and she was promoted to office manager in 2016. Reese's duties included answering the telephone, handling client billing, paying the monthly bills owed by the Respondent, scheduling client appointments for Dr. Nichols, and processing employee payroll for both the Respondent and House of Hope. As part of her payroll duties, Reese provided employees with copies of their pay stubs at their request.

In June, Reese became concerned that House of Hope was not paying its employees the legally required premium for overtime hours worked. She telephoned the United States Department of Labor's Wage and Hour Division, explained the situation, and asked what those employees should do. The Wage and Hour Division advised that each employee needed to contact it individually to open a case. Reese then asked House of Hope employees Sarah Hollis and Misty Hollis to have former House of Hope employees LeMatthew Wilson and Tyanna Jones contact her so that she could give them the telephone number for the Wage and Hour Division.[7] Thereafter, Wilson and Jones separately contacted Reese, and she explained to them how to pursue an overtime wage claim and gave them the Wage and Hour Division's telephone number. Wilson and Jones both authorized Reese to obtain copies of their pay stubs, and Reese informed Dr. Nichols of their requests. With Dr. Nichols' permission, Reese provided Wilson and Jones the requested copies of their pay stubs.[8] Reese subsequently researched the process for filing a third-party wage complaint with the Wage and Hour Division because Wilson and Jones were having difficulty contacting the agency, and because she felt that Dr. Nichols "did not treat her employees fairly."

On the morning of July 25, Reese, at Dr. Nichols' request, dropped off supplies at House of Hope. While there, Reese had a conversation with Misty Hollis. Reese complained that she was the only one of the Respondent's five office employees who had not received a pay raise, adding that she might file a race discrimination claim against the Respondent because she was the only white

[1] The Respondent, appearing pro se, had an opportunity to file an answering brief to the Acting General Counsel's exceptions and supporting brief, but did not do so.

[2] The Acting General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We have amended the judge's conclusions of law, modified his recommended Order, and added a remedial notice consistent with our findings herein.

[4] Dates are in 2018 unless otherwise indicated.

[5] As discussed below, the Respondent ceased operations on August 1, 2019.

[6] The Acting General Counsel does not allege that the Respondent and House of Hope are a single employer or joint employers.

[7] Prior to March, Misty Hollis worked as an assistant manager at House of Hope and had previously reported to Sarah Hollis until transferring to a direct care position. The record does not reveal Sarah Hollis' job title, but the judge noted that the Respondent had admitted, in discovery responses in a lawsuit discussed below, that Sarah Hollis supervised or managed employees. However, no party alleges that she was a Sec. 2(11) supervisor. Wilson's and Jones' employment with House of Hope had ended earlier in June.

[8] Although Reese asked Dr. Nichols for permission before providing copies of pay stubs to two former employees, the judge found that there was no evidence that Reese had to receive Dr. Nichols' permission before providing copies of pay stubs to current employees.

employee working in the office. Reese then told Misty Hollis that she had made copies of Respondent employees' timesheets.[9] Reese also asked Misty Hollis to keep copies of her own timesheets and to make copies of other House of Hope employees' timesheets because Reese had researched how to file a third-party wage complaint with the Wage and Hour Division. Misty Hollis declined to do either. Immediately thereafter, she telephoned Sarah Hollis and told her about the conversation with Reese. Sarah Hollis then relayed the details of that conversation to Dr. Nichols.

Later that morning, Dr. Nichols summoned Reese to a meeting in a manager's office. Clinical Director Clarence Thomas was present. Dr. Nichols asked Reese if she was gathering and "stealing" documents to make a claim against her with the Wage and Hour Division. Reese denied that she was stealing documents and said that she was not going to use timesheets to file a claim against Dr. Nichols. Dr. Nichols responded that Misty Hollis had said the opposite and asked Reese if Misty Hollis should join the meeting. Reese said yes. Dr. Nichols summoned Misty Hollis to the meeting and asked her about her conversation with Reese earlier that morning. Misty Hollis said that Reese had complained about not receiving a pay raise and had claimed that it may have been a race issue. Misty Hollis added that Reese mentioned making copies of Respondent employees' timesheets and asked her to make copies of House of Hope employees' timesheets, but that she had declined to do so. Reese denied that she had made copies of employees' timesheets and called Misty Hollis a liar. Reese admitted, however, that she told Misty Hollis about the race discrimination claim. Dr. Nichols replied that she knew Misty Hollis was telling the truth because, otherwise, Misty Hollis would not have known about the raises given to employees in the Respondent's office. Dr. Nichols then discharged Reese.

On August 30, Reese, Wilson, and Jones filed in the United States District Court for the Western District of Louisiana a collective action against the Respondent, House of Hope, and Dr. Nichols, alleging that the defendants had violated the Fair Labor Standards Act by failing to pay employees time-and-a-half for any hours worked in excess of 40 per workweek. On August 3, 2020, the court granted, in part, the plaintiffs' motion for summary judgment and awarded them compensation for unpaid overtime wages.

II. REESE'S JULY 25 PROTECTED CONCERTED ACTIVITY

The judge found that Reese engaged in "protected" activity on July 25 "when she informed Misty Hollis of her intention to file a legal action against the Respondent for racial discrimination" and "when she informed Misty Hollis that she made copies of employees' time sheets and told Misty Hollis to keep copies of her timesheets because Reese had done some research about filing a third-party wage complaint with the United States Department of Labor." However, the judge found that these activities were not concerted.[10] According to the judge, Reese's mention of the potential race discrimination claim was not concerted activity because it "addressed a matter unique to Reese—she was the only one alleging such treatment." The judge found that Reese's request for Misty Hollis to keep copies of her own timesheets and to make copies of House of Hope employees' timesheets also was not concerted activity because "there is no record of other employees expressing concern to Reese about overtime wages." Further, the judge noted that Misty Hollis likely had never expressed concern about the unpaid overtime wages owed to her because her actions "revealed an obvious loyalty to management." The Acting General Counsel excepts, arguing that Reese engaged in protected concerted activity during her July 25 conversation with Misty Hollis both by raising her potential race discrimination claim and by asking Misty Hollis to keep copies of her own timesheets and to make copies of other House of Hope employees' timesheets.

For the following reasons, we agree with the Acting General Counsel that the judge erred in finding that Reese's July 25 exchange with Misty Hollis was not concerted activity. Section 7 of the Act protects employee conduct that is both concerted and engaged in for the purpose of mutual aid or protection. In *Meyers I*, the Board defined concerted activity as conduct that is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." 268 NLRB at 497. In *Meyers II*, the Board clarified that this definition of concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of

[9] It is not clear from the record whether "pay stubs" and "timesheets" are different documents; however, the Acting General Counsel and the judge use the two terms interchangeably.

[10] The judge improperly characterized Reese's July 25 conduct as "protected" but not "concerted" because Sec. 7 of the Act "requires that the activities in question be 'concerted' before they can be 'protected.'" *Meyers Industries*, 268 NLRB 493, 494 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

management." 281 NLRB at 887.[11] Moreover, "Section 7 has long been held to protect employees when they pursue legal claims concertedly." *Cordúa Restaurants, Inc.*, 368 NLRB No. 43, slip op. at 4 (2019) (finding that an employee engaged in protected concerted activity "by discussing wage issues with his coworkers and filing an FLSA collective action alleging minimum wage and overtime violations"), enfd. 985 F.3d 415 (5th Cir. 2021); see also *Meyers II*, 281 NLRB at 887 ("[E]fforts to invoke the protection of statutes benefiting employees are efforts engaged in for the purpose of 'mutual aid or protection.'"); *Cristy Janitorial Service*, 271 NLRB 857, 857 (1984) (finding that an employee "was engaged in protected concerted activity when she and other employees complained about their wages to the Wage-Hour Division of the United States Department of Labor").

Given these settled principles, Reese's request that Misty Hollis keep copies of her own timesheets and make copies of other House of Hope employees' timesheets was concerted activity. By making that request, Reese solicited assistance with her pursuit of a legal claim for unpaid overtime wages owed to employees of the Respondent and House of Hope and attempted to induce Misty Hollis to join that effort, which was for the purpose of mutual aid and protection.[12] It is well established that "the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity." *Whittaker Corp.*, 289 NLRB 933, 933 (1988) (internal quotations omitted). Contrary to the judge, that Misty Hollis declined Reese's request and reported it to the Respondent did not negate the concerted nature of Reese's conduct. See, e.g., *Circle K Corp.*, 305 NLRB 932, 933 (1991) (finding that an employee did not have to accept another employee's "invitation to group action for the invitation itself to be 'concerted' within the meaning of Sec[.] 7"), enfd. mem. per curiam 989 F.2d 498 (6th Cir. 1993); *Whittaker Corp.*, 289 NLRB at 934 ("[E]mployees do not have to accept the individual's invitation to group action before the invitation itself is considered concerted."). The present case is similar to *Montgomery Ward & Co.*, 156 NLRB 7 (1965), where the Board found that an employee engaged in protected concerted activity by asking a coworker to "'go [along] with her'" in pursuing a claim against their employer for violating the Equal Pay Act, even though the solicited coworker declined the request and subsequently reported the soliciting employee to management. See id. at 9, 11 (alteration in original). Accordingly, Reese's request for Misty Hollis to keep copies of her own timesheets and to make copies of House of Hope employees' timesheets was, on its own, protected concerted activity.

We also agree with the Acting General Counsel's alternative rationale that Reese's request was protected as a logical outgrowth of her earlier protected concerted activity. The judge acknowledged, and no party disputes, that Reese previously had engaged in protected concerted activity by asking Sarah Hollis and Misty Hollis to have Wilson and Jones contact her so that she could give them the telephone number for the Wage and Hour Division, by telling Wilson and Jones how to contact the Wage and Hour Division, and by obtaining copies of their pay stubs for them. See, e.g., *East Village Grand Sichuan Inc. d/b/a Grand Sichuan Restaurant*, 364 NLRB 1966, 1966 fn. 2 (2016) (finding that an employee engaged in protected concerted activity by having "numerous concerted discussions with her coworkers concerning the [employer's] terms and conditions of employment" prior to filing a lawsuit alleging related violations of Federal and State labor laws).[13] Then, during their July 25 conversation, Reese followed up by soliciting Misty Hollis' support for that same collective legal claim. Thus, under our precedent, Reese's July 25 request of Misty Hollis was protected concerted activity for the additional reason that it was a logical outgrowth of earlier protected concerted activity. See *Cordúa*, 368 NLRB No. 43, slip op. at 4 (finding that an employee's "request to access his personnel records was . . . protected, as the access was sought for the purpose of verifying the [employer's] compliance with its obligations under State and Federal minimum wage laws, and the request logically grew out of the [employee's] protected concerted wage discussions with his coworkers"); see also *Amelio's*, 301 NLRB 182, 182 fn. 4 (1991) ("[A]n individual is acting on the authority of other employees where the evidence supports a finding that the concerns

[11] Concerted activity is engaged in for the purpose of mutual aid or protection where the employee or employees involved are seeking to "improve terms and conditions of employment or otherwise improve their lot as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). It is undisputed that if Reese's July 25 conversation with Misty Hollis was concerted activity, it was engaged in for the purpose of mutual aid or protection.

[12] Although Misty Hollis worked for House of Hope, which was technically a separate entity from the Respondent, the Act "was intended to protect employees when they engage in otherwise proper concerted activities in support of employees of employers other than their own." *Eastex*, 437 U.S. at 564.

[13] Although Wilson's and Jones' employment with House of Hope had ended by that time, "[t]he Board has held that the term 'employee' means 'members of the working class generally, including former employees of a particular employer.'" *Denny's Transmission Service*, 363 NLRB 1864, 1864 fn. 2 (2016) (quoting *Little Rock Crate & Basket Co.*, 227 NLRB 1406, 1406 (1977)); see also *Briggs Mfg. Co.*, 75 NLRB 569, 570–571 (1947).

expressed by the individual employee are a logical outgrowth of the concerns expressed by the group.").

In sum, we find, contrary to the judge, that Reese engaged in protected concerted activity during the July 25 conversation when she asked Misty Hollis to keep copies of her own timesheets and to make copies of other House of Hope employees' timesheets.[14]

III. INTERROGATIONS OF REESE AND MISTY HOLLIS

The judge dismissed the allegations that the Respondent violated Section 8(a)(1) by coercively interrogating Reese and Misty Hollis on July 25 on the basis that Dr. Nichols' questioning of Reese and Misty Hollis did not concern protected concerted activity. The Acting General Counsel excepts, arguing that the conversation between Reese and Misty Hollis on the morning of July 25 did involve protected concerted activity and that Dr. Nichols' questioning of those two about that conversation was unlawfully coercive.

To begin with, we agree that the questioning involved protected concerted activity. As discussed above, Dr. Nichols questioned Reese on July 25 about her conversation with Misty Hollis earlier that morning. We have found that Reese engaged in protected concerted activity in that conversation. Additionally, when Dr. Nichols asked generally if Reese was gathering documents to make a claim against her with the Wage and Hour Division, she clearly was referring to Reese's earlier protected concerted activity on behalf of Wilson and Jones.[15] Likewise, Dr. Nichols questioned Misty Hollis about that same July 25 conversation, which involved not only Reese's protected solicitation of Misty Hollis' support for an overtime wage claim but also Misty Hollis' exercise of her Section 7 right to refrain from so cooperating.

We also agree with the Acting General Counsel that Dr. Nichols' questioning was unlawfully coercive. To determine the lawfulness of an employer's interrogation, the Board evaluates whether, under all of the circumstances, the interrogation reasonably tended to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. See *Rossmore House*, 269 NLRB 1176, 1177 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). "Circumstantial factors relevant to the analysis include the employer's background (i.e., whether there is a history of union hostility or discrimination), the nature of the information sought (i.e., whether the interrogator appeared to be seeking information on which to base taking action against individual employees), the identity of the questioner (i.e., whether he or she held a high position in the company hierarchy), the place and method of interrogation (i.e., whether the employee was called from work to the interrogator's office, and whether there was an atmosphere of unnatural formality), and the truthfulness of the employee's reply." *Trinity Services Group, Inc.*, 368 NLRB No. 115, slip op. at 1–2 (2019), enf. denied on other grounds 998 F.3d 978 (D.C. Cir. 2021). Depending on the circumstances, a history of hostility toward protected concerted activity may also be a relevant factor.

Applying these factors to Reese's interrogation, we find Dr. Nichols' questioning coercive. Reese was summoned from work to a manager's office to be questioned by the Respondent's (and House of Hope's) highest-ranking management official, Dr. Nichols, in the presence of another management official, Clinical Director Thomas. See *Kumho Tires Georgia*, 370 NLRB No. 32, slip op. at 5 (2020) (finding an interrogation coercive where a management official interrogated an employee in a manager's office in the presence of another management official); *Naomi Knitting Plant*, 328 NLRB 1279, 1280 (1999) (finding that "the location and 'double-teaming' of the colloquy would have amplified the questioning's impact" where two management officials questioned an employee in a supervisor's office). Further, Reese attempted to conceal her protected concerted activity during the interrogation by disputing Misty Hollis' account of the conversation. See *Spectrum Juvenile Justice Services*, 368 NLRB No. 102, slip op. at 10 (2019) (explaining that an employee's attempt to conceal his protected concerted activity during an interrogation weighed in favor of finding the interrogation

[14] Although the Respondent does not claim that Reese lost the protection of the Act by asking Misty Hollis to obtain copies of House of Hope employees' timesheets or even that the timesheets were confidential, we note that the Board has held that employees' mere requests for information relevant to Sec. 7 activity are protected, "even if the employer contends [that the requested information] is confidential." *Faurecia Exhaust Systems*, 355 NLRB 621, 622 (2010). There is no evidence that Reese asked Misty Hollis to misappropriate the timesheets or to obtain them in disregard of any Respondent or House of Hope policy. See id. at 621–622 (finding that an employee engaged in protected activity by asking two coworkers to obtain employee names and contact information for him where there was no evidence that he asked them "to misappropriate the contact information or to obtain the records by disregarding any policy set forth in the [employer's] employee handbook"). In fact, the judge drew an adverse inference that the Respondent had no policies or rules prohibiting the type of activity in which Reese engaged because the Respondent failed to comply with the General Counsel's subpoena duces tecum seeking such documents. The Respondent has not excepted to that adverse inference.

Because we find that Reese engaged in protected concerted activity during her July 25 conversation with Misty Hollis by asking her to keep copies of her own timesheets and make copies of other House of Hope employees' timesheets, we find it unnecessary to pass on whether Reese also engaged in protected concerted activity during that conversation by mentioning her potential race discrimination claim.

[15] Dr. Nichols obviously knew about Reese's protected assistance to Wilson and Jones because Reese had asked her for permission to provide them with copies of their pay stubs, and Dr. Nichols had agreed.

unlawful). Finally, Dr. Nichols concluded the interrogation by discharging Reese, which, as discussed below, violated the Act. See *AdvancePierre Foods, Inc.*, 366 NLRB No. 133, slip op. at 3 (2018) (finding an interrogation coercive where, in addition to circumstances supporting coerciveness under *Rossmore House*, the employer "concluded the meeting by unlawfully disciplining" the interrogated employee), enfd. 966 F.3d 813 (D.C. Cir. 2020). Based on those circumstances, we reverse the judge and find that the Respondent violated Section 8(a)(1) by coercively interrogating Reese on July 25. See *Montgomery Ward*, 156 NLRB at 10–11 (finding that the employer unlawfully interrogated an employee about her discussions with coworkers regarding a claim that the employer violated the Equal Pay Act).

The same considerations apply to Dr. Nichols' interrogation of Misty Hollis, except that, unlike Reese, Misty Hollis truthfully answered Dr. Nichols' questions. Notwithstanding that she was not directly in the line of fire, Misty Hollis still reasonably would have been chilled in the exercise of her Section 7 rights, especially considering that Dr. Nichols discharged Reese in Misty Hollis' presence at the conclusion of the interrogation. Thus, we reverse the judge and find that the Respondent also violated Section 8(a)(1) by coercively interrogating Misty Hollis on July 25.

IV. DISCHARGE OF REESE

Applying *Wright Line*,[16] the judge found that the General Counsel failed to meet his initial burden of establishing that Reese's protected concerted activity was a motivating factor in the Respondent's decision to discharge her because the General Counsel failed to show that Reese engaged in protected concerted activity during her July 25 conversation with Misty Hollis. The judge therefore dismissed the allegation that the Respondent violated Section 8(a)(1) by discharging Reese. The Acting General Counsel excepts, arguing that Reese engaged in protected concerted activity and that this activity was a motivating factor in the Respondent's decision to discharge her. We agree that the judge erred.

Under *Wright Line*, the General Counsel has the initial burden of establishing that an employee's union or other protected concerted activity was a motivating factor in the employer's decision to take an adverse employment action against the employee. 251 NLRB at 1089. The elements commonly required to support such a showing are (1) the employee engaged in union or other protected concerted activity, (2) the employer had knowledge of that activity, and (3) the employer harbored animus against union or other protected concerted activity. See *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 5–6 (2019). In *Tschiggfrie Properties*, the Board clarified that "the General Counsel does not *invariably* sustain his burden by producing . . . *any* evidence of the employer's animus or hostility toward union or other protected activity" but instead must produce evidence "sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee." Id., slip op. at 8 (emphasis in original). If the General Counsel makes this initial showing, then the burden shifts to the employer to establish that it would have taken the same action even if the employee had not engaged in union or other protected concerted activity. *Wright Line*, 251 NLRB at 1089. However, "where an employer's purported reasons for taking an adverse action against an employee amount to pretext—that is to say, they are false or not actually relied upon—the employer necessarily cannot meet its *Wright Line* rebuttal burden." *CSC Holdings, LLC*, 368 NLRB No. 106, slip op. at 3 (2019).

As discussed above, we have found, contrary to the judge, that Reese engaged in protected concerted activity during her July 25 conversation with Misty Hollis. Reese also engaged in protected concerted activity in June when she explained to Wilson and Jones how to pursue an overtime wage claim with the Wage and Hour Division and obtained copies of their pay stubs for them. The Respondent learned of Reese's July 25 protected concerted activity from Sarah Hollis' secondhand report of Reese's conversation with Misty Hollis and from Dr. Nichols' interrogations of Reese and Misty Hollis. Further, Reese herself had alerted Dr. Nichols to her protected concerted activity by requesting permission to provide Wilson and Jones with copies of their pay stubs. And Dr. Nichols apparently suspected that this request was related to the legal claim for unpaid overtime wages that Reese raised to Misty Hollis because, during the July 25 interrogation, Dr. Nichols asked generally if Reese was gathering documents to make a claim against her with the Wage and Hour Division.

The timing of Reese's discharge raises a strong inference of discriminatory motivation because the Respondent discharged Reese on the same day as her July 25 conversation with Misty Hollis and immediately after Dr. Nichols had coercively interrogated her about her protected concerted activity. See *Lucky Cab Co.*, 360 NLRB 271, 274 (2014) ("The Board has long held that the timing of

[16] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

adverse action shortly after an employee has engaged in protected activity . . . may raise an inference of animus and unlawful motive."), enfd. mem. per curiam 621 Fed. Appx. 9 (D.C. Cir. 2015). Additionally, as the judge found, the Respondent gave inconsistent and shifting reasons for discharging Reese. See *Naomi Knitting Plant*, 328 NLRB at 1283 ("[T]he Board has long held that shifting reasons constitute evidence of discriminatory motivation.").[17] For those reasons, we find that the Acting General Counsel has established that a causal relationship existed between Reese's protected concerted activity and the Respondent's decision to discharge her and has thus met his initial burden under *Wright Line*.[18] See *Parkview Lounge, LLC d/b/a Ascent Lounge*, 366 NLRB No. 71, slip op. at 2 (2018) (finding that an employee's protected concerted activity was a motivating factor in the employer's decision to discharge the employee where the employer discharged her 2 days after she engaged in protected concerted activity and gave shifting and inconsistent reasons for the discharge), enfd. mem. 790 Fed. Appx. 256 (2d Cir. 2019).

Turning to the Respondent's defense, we note first the judge's finding that the Respondent's inconsistent and shifting reasons for Reese's discharge "preclude [the Respondent] from meeting its burden of establishing that it would have acted in the same manner absent" Reese's July 25 conversation with Misty Hollis. No party has excepted to or disputed that finding. In any event, we agree with the judge that the Respondent's purported reasons for discharging Reese were pretextual. Not only did the Respondent give inconsistent and shifting reasons for why it discharged Reese, but it also failed to produce evidence to support those reasons. The only evidence that the Respondent produced to support its claim that it had reprimanded Reese numerous times for unprofessional behavior was a single verbal warning for making billing mistakes that it issued to Reese more than a year before her discharge. This verbal warning, which was documented in an email, stated that Reese would be subject to a written warning for the next incident and then termination, but the Respondent did not produce any evidence that Reese made additional billing mistakes or engaged in any other misconduct. Further, the Respondent did not produce any credible evidence to support its claim that Reese failed to follow the work schedule, as the judge discredited the testimony of the Respondent's caseworker and assistant office manager, Nicole Nichols, that Dr. Nichols verbally reprimanded Reese for failing to clock in and out properly. Because the Respondent's purported reasons for discharging Reese were pretextual, the Respondent necessarily cannot meet its defense burden under *Wright Line*.

Accordingly, we reverse the judge in this respect as well and find that the Respondent violated Section 8(a)(1) by discharging Reese.

AMENDED CONCLUSIONS OF LAW

1. The Respondent, Healthy Minds, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act on July 25, 2018, by engaging in the following conduct:

(a) Coercively interrogating Kimberly Defrese-Reese about her protected concerted activity.

(b) Coercively interrogating Misty Hollis about her protected activity and the protected concerted activity of other employees.

(c) Discharging Kimberly Defrese-Reese for engaging in protected concerted activity.

3. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent violated Section 8(a)(1) of the Act by discharging Kimberly Defrese-Reese, we shall order the Respondent to make her whole for any loss of earnings and other benefits suffered as a result of the unlawful discharge. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356

[17] As discussed above, the Respondent discharged Reese immediately after interrogating Reese and Misty Hollis about their conversation earlier that day. In fact, Clinical Director Thomas, who was present when Reese was discharged, testified that Dr. Nichols discharged Reese right after learning from Misty Hollis that Reese "had been saying negative stuff" about the Respondent. However, the Respondent claimed for the first time at the hearing that it would show that it had previously reprimanded Reese numerous times for unprofessional behavior and failure to follow the work schedule. Dr. Nichols did not mention such misconduct by Reese at the time of her discharge. And, as explained below, the record evidence does not support the Respondent's 11th-hour claims.

[18] As stated in her concurring opinion in *Tschiggfrie Properties, Ltd*., supra, slip op. at 10, Chairman McFerran believes that the majority's "clarification" of *Wright Line* principles in that case was unnecessary as the "concepts [discussed by the majority there] are already embedded in the *Wright Line* framework and reflected in the Board's body of *Wright Line* cases." Ibid. Applying the Board's well-established *Wright Line* precedent here, Chairman McFerran agrees with her colleagues that the Acting General Counsel met his initial burden of establishing that protected activity was a motivating factor for Reese's discharge.

NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB 1153 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondent to compensate Reese for her search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Further, we shall order the Respondent to compensate Reese for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s). *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). In addition, we shall order the Respondent to file with the Regional Director for Region 15 a copy of Reese's corresponding W-2 form(s) reflecting the backpay award. *Cascades Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021). We shall also order the Respondent to remove from its files any reference to the unlawful discharge of Reese and to notify her in writing that this has been done and that the unlawful discharge will not be used against her in any way.

The remedy for this violation would ordinarily also include an order requiring the Respondent to offer full reinstatement to Reese within 14 days from the date of our Order. However, because the Respondent has ceased operations,[19] we shall not order the immediate reinstatement of Reese. Instead, we shall order the Respondent, in the event that it resumes the same or similar business operations, to offer Reese full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

Because the Respondent has ceased operations, we shall order the Respondent to mail a copy of the attached notice to the last known addresses of its former employees who were employed by the Respondent at any time since July 25, 2018, in order to inform them of the outcome of this proceeding.

[19] The Respondent's co-owner, Dr. Nichols, testified that the Respondent sold its business to Seaside Healthcare on August 1, 2019. Additionally, in a July 30, 2019 letter to the Louisiana Department of Health and Office of Behavioral Health, Dr. Nichols wrote as follows:

> Healthy Minds is closing its business located at 209 West Jefferson Ave. Bastrop, La 71220 . . . as of 7/31/2019. Seaside Healthcare will take over the [sic] that were associated with Healthy Minds. The take over date is scheduled for 8/1/2019.

The Acting General Counsel has not disputed this evidence and does not allege that Seaside Healthcare is liable for the Respondent's unfair labor practices under *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).

ORDER

The National Labor Relations Board orders that the Respondent, Healthy Minds, Inc., Bastrop, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their protected concerted activities or the protected concerted activities of other employees.

(b) Discharging or otherwise discriminating against employees for engaging in protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) In the event the Respondent resumes operations, offer Kimberly Defrese-Reese full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Kimberly Defrese-Reese whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision.

(c) Compensate Kimberly Defrese-Reese for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

(d) File with the Regional Director for Region 15 a copy of Kimberly Defrese-Reese's corresponding W-2 form(s) reflecting the backpay award.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Kimberly Defrese-Reese, and within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form,

necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix"[20] to the last known addresses of all employees who were employed by the Respondent at any time since July 25, 2018. In addition to the mailing of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 15 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 15, 2021

Lauren McFerran, Chairman

William J. Emanuel, Member

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
MAILED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your protected concerted activities or the protected concerted activities of other employees.

WE WILL NOT discharge or otherwise discriminate against you for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, in the event we resume operations, offer Kimberly Defrese-Reese full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Kimberly Defrese-Reese whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest, and WE WILL also make her whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Kimberly Defrese-Reese for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

WE WILL file with the Regional Director for Region 15 a copy of Kimberly Defrese-Reese's corresponding W-2 form(s) reflecting the backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Kimberly Defrese-Reese, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

HEALTHY MINDS, INC.

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The Board's decision can be found at www.nlrb.gov/case/15-CA-23176 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Nariea Nelson, and *William Hearn, Esqs.,* for the General Counsel.

Dr. Angela Nichols, of Bossier City, Louisiana, for the Respondent Pro Se.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried by remote Zoom technology on November 5, 2020. The complaint alleges that the Respondent, Healthy Minds, Inc., violated Section 8(a)(1) of the National Labor Relations Act (the Act)[1] by: (1) interrogating employees on July 25, 2018,[2] about their protected concerted activities relating to wage and hour claims, and (2) discharging the charging party, Kimberly R. Defrese-Reese (Reese), because she engaged in such activity. The Respondent denied the charges, including the allegation that it has been engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At the outset of the hearing, the General Counsel moved for adverse inferences to be drawn on the ground that the Respondent failed to comply with its subpoena duces tecum requesting the production of numerous company records. The Respondent did not seek to revoke the subpoena prior to the hearing. Instead, the Respondent merely replied at the hearing that it was unable to produce the records because it sold the business to Seaside Healthcare on August 1, 2019 and no longer possessed them. The Respondent explained that the documents would be in Seaside Healthcare's possession but provided no further information.[3] However, the Respondent then proceeded to introduce evidence of records that would have fallen within the scope of the subpoena—telephone expenses, Reese's unemployment insurance benefits determination, Reese's pay adjustment history, and emails. That production demonstrated that there was more—the Respondent either possessed or had the ability to obtain the records responsive to the General Counsel's subpoena duces tecum. Although appearing pro se the Respondent clearly understood the process well enough to manipulate it. The Respondent's blatant disregard for the General Counsel's subpoena duces tecum, coupled with its presentation of selective evidence, warrants the application of inferences adverse to the Respondent's version of the facts where appropriate. *Bannon Mills,* 146 NLRB 611, 633–634 (1964).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits that, at the relevant times, it was a corporation with an office and place of business at 209 West Jefferson Avenue in Bastrop, Louisiana (Respondent's facility), and was engaged in providing mental health counseling services. It denies, however, that it was engaged in interstate commerce and contends that the Board lacks jurisdiction over it.

As a mental health counseling service, the Respondent classifies its operations as a health care institution pursuant to Section 2(14) of the Act. The Board's current standard for the assertion of jurisdiction over health care institutions[4] is an annual gross revenue of at least $250,000. *East Oakland Community Health Alliance. Inc.,* 218 NLRB 1270, 1271 (1975*)* (Board exercised jurisdiction over a family health clinic who received $263,783 in funds through federal revenue sharing). The Respondent easily surpasses that threshold by billing $170,000 to $200,000 per month to the federal Medicaid program. The Board recognizes Medicaid billings as transactions in interstate commerce because the payments come from the federal government and are transferred across state lines. See *Danville Nursing Home*, 254 NLRB 907, 908 (1981); *J.M. Abraham, M.D., P.C.*, 242 NLRB 839, 839 (1979); *Glen Manor Home for Jewish Aged v. NLRB*, 474 F.2d 1145, 1147 (6th Cir. 1973).[5] In addition, the Respondent purchased and received goods at its facility totaling approximately $8700 per year from ADT Security, Sudenlink and DirecTV—all companies engaged in interstate commerce.[6] *Marty*

[1] 29 U.S.C. § 151-169.

[2] Add dates are in 2018 unless otherwise stated.

[3] The subpoena requested, in pertinent part: "If any document responsive to any request herein was, but no longer is, in Respondent's possession, custody or control, identify the document (stating its date, author, subject, recipients and intended recipients); explain the circumstances by which the document ceased to be in your possession, custody or control; and identify (stating the person's name, title, business address and telephone number, and home address and telephone number) of all persons known or believed to have the document or a copy thereof in their possession, custody or control." (GC Exh. 2 at 3.)

[4] In the case of nursing homes, visiting nurse associations, and other related facilities, the Board requires minimum annual gross revenues of $100,000.

[5] Due to the Respondent's failure to produce subpoenaed information relating to its procurement of goods and services through interstate commerce, the only credible evidence presented on the issue of monetary jurisdiction was Reese's credible testimony on that that issue. (Tr. 33; GC Exh. 2.)

[6] Given the Respondent's failure to produce documentation, the record is based on Reese's credible testimony regarding the monthly expenses: ADT alarm system bill—approximately $200 a month; DirecTV bill—approximately $200 per month; Suddenlink internet bill—

Levitt, 171 NLRB 739 (1968) ($1500 in out-of-state activities "is more than de minimis); *Aurora City Lines, Inc.*, 130 NLRB 1137, 1138 (1961), enfd. 299 F.2d 229, 231 (7th Cir. 1962) (court upheld the Board's assertion of jurisdiction based on $2,000 of indirect inflow.

Accordingly, I find that the Respondent annually purchased and received goods at its facility valued in excess of $250,000, the minimum statutory amount for health care institutions, directly from points outside the State of Louisiana and, thus, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Respondent's Operations

The Respondent is licensed as a behavioral health company with the Louisiana Department of Health. It is owned and operated by Dr. Angela Nichols (Nichols), Garland Smith and Jerry Brown. Nichols also owns and operates a related business, House of Hope, a therapeutic group home for boys with behavioral problems. In addition to common ownership, Respondent's facility and House of Hope were adjacent to each other.

The following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act: Angela Nichols—owner, executive director and program manager; Clarence Thomas—clinical director; and Tillman Watkins—corporate compliance officer. As executive director, Nichols oversaw child placement and employee staffing. She handled all related regulatory and contractual paperwork. Nichols was also the part-owner, executive director and program director for House of Hope.

The Respondent employed between 20 to 50 employees. The positions included the program manager, clinical manager, office manager, licensed practical nurse, file clerk, corporate compliance officer and mental health providers. There were five office staff, including Reese. Of those positions, the clinical director, the corporate compliance officer, and program manager are salaried. The remaining employees were paid hourly.[7]

Reese, an Arkansas resident, was employed initially by the Respondent as assistant office manager in March 2015. She was eventually promoted to office manager in 2016 and was supervised by Nichols. She answered the telephone, scheduled client appointments for Nichols, and processed the employee payroll for the Respondent and House of Hope. As part of her payroll duties, Reese provided employees with copies of their pay stubs.[8]

Misty Hollis was initially hired by House of Hope in 2017 as assistant manager. She was supervised by Sarah Hollis.[9] In March, Misty Hollis transferred to a direct care worker position after she and Sarah Hollis disclosed their romantic relationship. As a direct care worker, Misty Hollis reported to Nichols. She resigned in September 2019 to take another job.

On July 30, 2019, Nichols notified the Louisiana Department of Health and Behavioral Health that the Respondent was "closing its business . . . as of 7/31/2019. Seaside Healthcare will take over . . . The take over date is scheduled for 8/1/2019. All client records are located at 209 West Jefferson Ave. Bastrop, La 71220 . . . I am returning the license associated with this entity license number . . ."[10]

B. Reese's Performance History with the Respondent

Reese received six wage increases during her employment.[11] She also received annual performance evaluations. In Reese's 2016 performance evaluation, Nichols rated Reese as a four (4), which meant Reese exceeded expectations or consistently exceeded expectations in the following categories: productivity/performance, quality, job knowledge, interpersonal teamwork, and attendance/punctuality.[12] In 2017, Nichols also rated Reese's performance as exceeding expectations in productivity/performance, job knowledge, safety/housekeeping, and a 4.5 in attendance/punctuality.[13] Additionally, Reese received ratings of meets expectations in work quality and interpersonal teamwork.[14] In Reese's March 3, 2018, performance evaluation, just a few months before Nichols discharged her, Nichols rated Reese's performance as exceeding expectations in the categories of quality, job knowledge, safety/housekeeping, and attendance/punctuality, and meeting expectations in productivity/performance. The only category where Reese did not meet or exceed expectations was interpersonal teamwork.[15]

During her tenure with the Respondent, Reese was issued only one discipline.[16] In an email to Reese, Watkins and Thomas on August 21, 2017, Nichols raised concerns about "several errors in billing, and authorizations." However, the discipline to Reese that followed indicated that Nichols mainly attributed the problem to Reese:

> Please consider this email as a verbal warning on specific job duties. It is company policy to ensure that all bills, and accounts be paid on or before schedule due dates. You have made several mistakes in regards to this manner and it is unacceptable. Please note that the next incident will result in a written reprimand and the final action will be termination. As always

approximately $200 a month; online purchases at Office Depot—approximately $125 per month. (Tr. 33–36.)

[7] Nicole Nichols, a caseworker, also functioned as assistant office manager but was not a supervisor. (Tr. 115, 117.)

[8] Although Reese obtained Nichol's approval to send pay stubs to two former employees, there is no evidence that she was required to get Nichols' approval when current employees asked for copies of their pay stubs. (Tr. 41–43.)

[9] The Respondent admitted in discovery responses in Reese's 2018 suit for overtime pay that Sarah Hollis supervised or managed employees. (GC Exh. 6 at 11.)

[10] GC Exh. 2(b).

[11] R. Exh. 7.

[12] GC Exh. 10.

[13] R. Exh. 8.

[14] GC Exh. 9.

[15] GC Exh. 11.

[16] I did not credit Nicole Nichols' vague testimony in response to leading questioning that the Respondent had a rule about "clocking in, clocking out" and that Reese was verbally reprimanded on several occasions for violating that rule. (Tr. 115–116.) Given the Respondent's failure to comply with the subpoena duces tecum, it would be inappropriate to rely on such testimony.

Healthy Minds appreciates all of your hard work and dedication.[17]

C. Reese's Concerns About Overtime Pay

In or about June, a House of Hope employee, Sarah Hollis asked Reese to process termination paperwork for House of Hope direct care workers LeMatthew Wilson and Tyanna Jones. Later that day, Sarah Hollis also asked Reese if Nichols had the right to withhold paychecks from House of Hope employees until Nichols got reimbursed by the Medicaid program. Reese told Hollis she would find out.[18]

Reese promptly contacted the Wage and Hour Division of the United States Department of Labor (DOL) to inquire whether the Respondent could change employees' scheduled pay dates. Reese was informed by the DOL investigator that an employer can change a pay date at any time without advanced notice. Reese was not satisfied with that answer ("I just couldn't buy it"), so she called the Departments of Labor for Louisiana and Arkansas.[19] Someone at the Arkansas agency told her that "an employer could change a pay date if it was permanent, but not just because they're waiting on reimbursement from the insurance company." However, the Arkansas employee did not know about Louisiana's law on that issue. Reese briefed Sarah Hollis about her conversations with the regulatory agencies and the conclusion that Nichols could lawfully withhold employee wages.

Reese's mission, however, did not end there. She reached out to DOL again "because the House of Hope people worked a lot of overtime but were only paid straight time."[20] She asked the investigator "what it is we—you know, they needed to do." The investigator explained to Reese that "each individual employee would have to call to open a case."[21] The DOL investigator instructed Reese to have the affected employees contact DOL directly. After speaking with DOL, Reese went to House of Hope and spoke with Misty Hollis and Sarah Hollis. She "told" one of them to have Wilson and Jones contact her so she "could give them the investigator's number at Wage and Hour, so they could get something going with them."[22]

Wilson and Jones contacted Reese at different times, and she instructed them to call the DOL investigator to initiate wage claims. However, Reese knew that Wilson and Jones would need copies of their pay stubs in order to file wages claim with DOL. In her position, employees would regularly ask Reese for copies of their pay stubs to apply for government assistance, purchase a home, or file tax returns. After Wilson and Jones contacted her, however, Reese told Nichols that they requested copies of their pay stubs. Each time, Nichols told Reese to print and mail the pay stubs to each of them, and Reese did so.[23]

On July 24, Reese received a text message on her personal cellular telephone from Nichols. After receiving the text message, Reese called Nichols and confirmed that Nichols wanted Reese to pick up the supplies for House of Hope.[24]

After picking up supplies for House of Hope on July 25, Reese called Sarah Hollis to let her know she was on the way. Sarah Hollis told Reese that she was off that day, but that Misty Hollis was at House of Hope and she let her know that Reese was on the way. When Reese arrived, Misty Hollis and some of the group home residents met Reese in the driveway to unload the supplies. Reese and Misty Hollis initially engaged in some initial banter about the supplies and the fact that Sarah Hollis was off that day. Reese then expressed her dismay with the fact that she was the only office employee who did not get a pay raise. She believed the slight was attributable to racial discrimination because she was the only white employee in the office. Reese also revealed her intention to file an unfair labor practice claim. Finally, Reese explained that she made copies of the Respondent employees' timesheets. Reese told Misty Hollis to keep copies of her timesheets because Reese researched the process for filing a third-party wage complaint with the DOL. She also asked Misty Hollis to make copies of House of Hope employees' timesheets.[25] Misty Hollis declined to do so. Reese then told Misty Hollis that Reese was sending someone into House of Hope to

[17] R. Exh. 8, 9 and 9(a).

[18] Reese was ambivalent about her discussion with Sarah Hollis: "I don't know if I called her or she called me." (Tr. 39–40.)

[19] Bastrop, Louisiana is about 20 miles from the Arkansas state line. (Tr. 40.)

[20] See Fair Labor Standards Act, 29 U.S.C. § 201 et seq.

[21] Reese did not specify the date when she called DOL again. More importantly, her testimony indicates her second inquiry was not at the request of any other employee. (Tr. 41, 84–85.) In fact, Misty Hollis' credible testimony indicates that she rebuffed Reese's discussion about overtime pay and request to copy timesheets on July 25. (Tr. 83.)

[22] Reese was not clear as to which Hollis she was referring to when she said she "told her" to have Wilson and Jones call her "so they could get something going with [DOL]." In any event, her testimony failed to establish that either Hollis met with Reese out of concern for their own pay. Misty Hollis was asked by the General Counsel whether she "[had] any issues with not being paid overtime while working at House of Hope." She answered that "[in] the beginning, Dr. Nichols only paid straight time," but did compensate employees for overtime after Reese filed a "complaint" with the Board. (Tr. 84–85.) When construed in context with her actions on July 25, discussed below, Misty Hollis had a strong loyalty to management that made it unlikely that she would have expressed concerns over her own pay to Reese.

[23] I do not credit Reese's uncorroborated hearsay testimony that Wilson and Jones asked for copies of their pay stubs." Reese initially contacted DOL and two state agencies after Sarah Hollis asked if Nichols could withhold pay pending Medicaid reimbursement. She was informed that Nichols could do that, but she could not file claims on behalf of others; each employee would need to contact DOL directly. After her second inquiry to DOL, Reese knew that Wilson and Jones would need copies of their pay stubs if they were going to file claims for overtime pay with DOL. It is reasonable to infer, therefore, that Reese informed Wilson and Jones about the process, which included submission of copies of their pay stubs, and they authorized Reese to ask Nichols for permission to provide them with the copies. Equally as significant, the record reveals no evidence that Nichols knew what Reese was up to when she asked for authorization to provide two former employees copies of their pay stubs. (Tr. 41–43.)

[24] Reese's testimony regarding her shopping assignment was not disputed. (Tr. 44–46; GC Exh. 3–4.)

[25] It is unclear at what point Reese learned that employees would also need copies of their timesheets in order to file claims for overtime wages.

keep an eye on the employees. Misty Hollis told Reese that she did not want to discuss that in front of the residents.[26]

After her conversation with Reese, Misty Hollis went into House of Hope and telephoned Sarah Hollis. She told Sarah Hollis about the conversation with Reese. Sarah Hollis then relayed Misty Hollis' version of her conversation with Reese to Nichols.[27]

D. The Respondent's Response to Defrese-Reese's Activities

Within 30 minutes, Nichols called Reese into Watkins' office. Thomas and Nichols were present; Watkins was not. Nichols asked Reese if she was compiling documents to make a claim against her. Nichols also asked Reese if she was stealing timesheets in order to file a claim with the DOL. Each time, Reese answered no. Nichols asked Reese if she wanted Misty Hollis to come to the meeting. Reese agreed and Nichols summoned Misty Hollis to the office. Nichols asked Misty Hollis about her conversation with Reese that morning. Misty Hollis told Nichols that Reese complained about "everyone in the office getting a raise but her, and that [Reese] thought it was a race issue." Misty Hollis also told Nichols that Reese said she had been making copies of employees' timesheets. She added that Reese asked her to make timesheets of House of Hope employees and she declined. Reese denied making copies of employees' timesheets and called Misty Hollis a liar. Reese admitted, however, that she told Misty Hollis about suing for racial discrimination because she did not get a raise. Nichols said she knew Misty Hollis was telling the truth because she would not have known about the raises in the office.[28] Nichols then discharged Reese.[29]

E. Reese's Other Post-Discharge Actions

After she was discharged, Reese filed a claim for unemployment benefits. The denial of the claim by the Louisiana Workforce Commission on August 22, which Reese appealed, was based on the following determination:

> You were discharged from your employment because of your failure to abide by company rules/policies. You were aware of these rules/policies. Your discharge was for misconduct connected with the employment.[30]

Reese had a better result recovering overtime wages. On August 30, Reese, Wilson, and Jones filed a collective complaint for unpaid overtime against the Respondent in the United States District Court in the Western District of Louisiana. On August 3, 2020, United States District Judge Terry A. Doughty issued a ruling granting a motion for summary judgment in part and requiring Respondent pay Reese, Wilson, and Jones unpaid wages.[31]

Legal Analysis

The General Counsel alleges that Nichols, the Respondent's co-owner and program director, violated Section 8(a)(1) of the Act on July 25 in two respects. In the first instance, Nichols allegedly questioned Reese and Misty Hollis in another manager's office about their protected concerted activities relating to overtime pay and Reese's allegations about racial discrimination. Shortly thereafter, Nichols discharged Reese after Misty Hollis confirmed Reese's statements related thereto. The Respondent did not dispute interrogating Reese and Misty Hollis about those remarks but contends that Reese was lawfully discharged because she violated company rules.

A. Nichols' Interrogation of Employees on July 25

In determining whether questioning amounts to unlawful interrogation, the Board considers whether the employer interfered, restrained or coerced employees in the exercise of their Section 7 rights. *EF International Language Schools*, 363 NLRB 199 (2015). Specifically, the Board evaluates (1) the nature of the information sought; (2) the identity and rank of the questioner; (3) the place and method of the interrogation; (3) whether it creates "an atmosphere of unnatural formality;" and (4) "the truthfulness" of the replies when determining whether the questioning of an employee constitutes an unlawful interrogation). *Westwood Health Care Ctr.*, 330 NLRB 935 (2000).

There is no doubt that Nichols, the program manager and coowner, summoned Reese and then Misty Hollis to a hastily convened formal meeting in another manager's office. Once there, Nichols questioned both about Reese's earlier comments to Misty Hollis. Nichols asked them if it was true that Reese complained about being racially discriminated against with respect

[26] Reese and Misty Hollis gave slightly different versions of the conversation. I credited most of Misty Hollis' testimony about this encounter. Reese's version on the other hand, did not add up. She testified that she told Misty Hollis to "keep up with her timesheets, make sure to turn them in correctly, and watch her back." Reese denied asking Misty Hollis to provide copies of timesheets: "Because I did some research and found out that I could do a like third party complaint to [DOL]. And that way she would have her—her timecards with her correct time." She said that she researched this "[b]ecause [Wilson and Jones] was having a hard time trying to get through to [DOL], and I just felt like Dr. Nichols just did not treat her employees fairly." (Tr. 46–49, 81–82, 86–87.) Reese's focus on filing a third-party complaint was inconsistent with her testimony that each employee would need to file individually. Moreover, her testimony that Misty Hollis should "watch her back" was not explained.

[27] I credit Misty Hollis' hearsay testimony that Sarah Hollis said she would report that information to Nichols. Although Sarah Hollis did not testify, the substance of her conversation with Misty Hollis was corroborated a short while when Nichols confronted Reese about those statements and, when Reese denied making them, summoned Misty Hollis to confirm them. (Tr. 82–83.)

[28] Reese and Misty Hollis provided generally consistent versions as to what was said during this meeting. (Tr. 49–51, 83–84, 112.)

[29] The Respondent's deliberate noncompliance with the subpoena duces tecum for company documents, including rules and policies, warrants appropriate sanctions. Watkins testified credibly regarding the Respondent's alleged custom and practice of counseling employees for minor infractions and issuing written reprimands for more serious infractions and/or action plans. (Tr. 106–109.) Coupled with the lack of evidence as to the level of misconduct that would justify termination, the Respondent's failure to provide copies of its rules and policies warrants an inference that the Respondent had no rules or policies relating to termination.

[30] I gave the Louisiana agency's determination no weight. The Respondent asserts that the denial of unemployment benefits was "because they found out . . . the reason was a policy that she was aware of rules and policy. She was discharged for misconduct connected with employment." (R. Exh. 4.) Once again, the Respondent's failure to comply with the subpoena duces tecum, including company rules and policies, warrants a finding that there were none.

[31] GC Exh. 5–6.

to pay raises. She also asked whether Reese copied other employees' timesheets and asked Misty to make copies as well. Reese admitted her intention to bring a legal action for racial discrimination. However, she called Misty Hollis a liar and denied making unauthorized copies of employees' timesheets or asking Misty Hollis to do the same.

Nichols inquiry into Reese's accusations of racial discrimination addressed a matter unique to Reese—she was the only one alleging such treatment. There was no group concern at issue there. Nichols' questioning about the timesheets, on the other hand, related to overtime wages, an issue affecting the hourly employees. Reese "told" either Misty Hollis or Sarah Hollis to have former House of Hope employees Wilson and Jones contact her so she "could give them" the DOL investigator's number "so they could get something going with them." She then asked Nichols for permission to send them copies of their timesheets in order to file their claims. Nichols authorized Reese to mail Jones and Wilson their timesheets. As such, Reese's advocacy on their behalf qualified as protected concerted conduct since it related to a term and condition of employment—wages—and was "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries*, 268 NLRB, 493, 497 (1984). That sequence of events, however, is not what the July 25 meeting was about.

Nichols' inquiries at the July 25 meeting were not about Reese's copying of timesheets for former employees Wilson and Jones, which Nichols authorized. Nor were they about the sequence of events where Reese initially contacted DOL at Sarah Hollis' request regarding the withholding of pay for Jones and Wilson. Nichols' interrogation related to Reese's copying of timesheets in order to file future claims for overtime pay with DOL. The problem with that issue, however, is that there is no record of other employees expressing concern to Reese about overtime wages. Misty Hollis eventually enjoyed the fruits of Reese's campaign to recover overtime owed the hourly employees. However, her gratitude for Reese's efforts certainly was not evident when she immediately reported Reese's comments to Sarah Hollis, who in turn immediately notified Nichols. Misty Hollis' spontaneous reaction revealed an obvious loyalty to management, making it unlikely that she would have previously expressed concern to Reese over her own overtime wages.

Under the circumstances, Nichols' interrogation on July 25 was lawful because it addressed matters particular to Reese, not subjects of group concern. See *Meyers Industries*, *Inc.,* 281 NLRB 882, 887 (1986) (Meyers II), affd. sub nom, Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987) (concerted conduct includes instances in which an individual employee brings group complaints to the attention of management); *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992), citing *Salisbury Hotel*, 283 NLRB 685, 687 (1987) (conduct is concerted where the evidence supports a finding that the concerns expressed by the individual are the logical outgrowth of the concerns expressed by the group); *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 153 (2014), citing *City Disposal Systems*, 465 U.S. 822, 831 (1984) (concerted conduct must be linked to the actions of coworkers). Accordingly, this charge is dismissed.

B. Reese's Discharge on July 25

In order to prove the Respondent unlawfully discharged Reese on July 25, the General Counsel must show that an employee's protected concerted activity was a motivating factor in an employer's decision to take adverse action against the employee. The General Counsel meets this burden by showing that the employee engaged in protected concerted activity, and the employer had knowledge of, and harbored animus against, such activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See also *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 1 (2019) ("evidence of animus must support finding that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee.") If the General Counsel establishes those elements, the burden shifts to the employer to affirmatively prove that the same action would have taken place absent the protected activity. *Donaldson Bros Ready Mix, Inc.*, 341 NLRB 958, 961, 965 (2004) (employer had not sent employees home early or prohibited them from clocking in early at any time during the previous 9 years and did not establish a business reason for doing so now).

Nichols discharged Reese almost immediately after learning on July 25 that Reese told Misty Hollis that she (1) intended to take legal action due to racial discrimination in the award of pay raises and (2) was copying employees' timesheets and asked Misty Hollis to do the same in order to facilitate the filing of a collective action for overtime wages. Moreover, the Respondent's subsequent reasons for terminating Reese—problems with clocking-in and clocking-out and a vaguely characterized failure to comply with company rules—were inconsistent with those expressed by Nichols on July 25 (copying or stealing timesheets and badmouthing the company). See *Lucky Cab Co.*, 360 NLRB 271, 274 (2014) (shifting explanations for adverse action indicates pretextual reasoning); *In re Medic One*, Inc., 331 NLRB 464, 475 (2000) (animus towards protected remarks demonstrated by suspiciously close timing of, and the admitted, shifting and unsubstantiated reasons for, the discharge). Those facts also preclude the Company from meeting its burden of establishing that it would have acted in the same manner absent the activity. See *Parkview Lounge, LLC d/b/a Ascent Lounge*, 366 NLRB No. 71 slip op. at 10 (2018) (inconsistent or shifting reasons alleged for discharge 2 days after the concerted protected activity were mere pretext to mask unlawful motive).

As previously discussed, however, the record is devoid of credible evidence that Reese's protected conduct on July 25 was "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee [herself]." *Meyers Industries*, above. Reese did engage in protected concerted conduct on behalf of former employees Jones and Wilson with respect to the issuance of their final paychecks and then assisted them in filing claims for overtime wages—all prior to July 25. She also admitted that she intended to file a legal action for racial discrimination. Those facts and circumstances alone, however, do not alleviate the General Counsel's burden to establish that Reese's protected activity was in concert with concerns expressed to her by other employees. Here, there was clear and consistent evidence that Reese was the advocate for all the hourly employees but there was no linkage to group action. See

Ewing v. NLRB, 861 F.2d 353, 357 (2d Cir. 1988) (action is "concerted" if an individual act has "some demonstrable link with group action"); *NLRB v. Caval Tool Div*., 262 F.3d 184, 190 (2d Cir. 2001) (intent to initiate group action can "be inferred in the context of a group meeting held to discuss the terms and conditions of employment"). Lacking proof of that first element of the *Wright Line* analysis, the charge for unlawful termination is also dismissed.

Conclusions of Law

1. The Respondent, Healthy Minds, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Reese engaged in protected activity on July 25, 2018, when she informed Misty Hollis of her intention to file a legal action against the Respondent for racial discrimination.

3. Reese engaged in protected activity on July 25, 2018, when she informed Misty Hollis that she made copies of employees' timesheets and told Misty Hollis to keep copies of her timesheets because Reese had done some research about filing a third-party wage complaint with the United States Department of Labor.

4. Reese's protected activities on July 25, 2018, were not concerted and, therefore, it was not proven by a preponderance of the evidence that the Respondent unlawfully interrogated Reese and Misty Hollis, and then discharged Reese in violation of Section 8(a)(1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER

The complaint is dismissed.